

Nov 17 5 00 PM '05
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b),)

Table of Allotments,)

FM Broadcast Stations.)

(Cumberland, Kentucky, Weber City,)

Glade Spring and Marion, Virginia))

MB Docket No. 05-295

RM-11280

NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Adopted: November 14, 2005

Released: November 16, 2005

Comment Date: January 9, 2006

Reply Comment Date: January 24, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Rule Making filed by JBL Broadcasting, Inc. ("Petitioner"), licensee of Station WVEK-FM, Channel 274A, Cumberland, Kentucky, proposing the upgrade to Channel 274C3 at Cumberland, the reallocation of Channel 274C3 from Cumberland to Weber City, Virginia, and the modification of Station WVEK-FM's license accordingly. To accommodate the reallocation, Petitioner also proposed (a) the substitution of Channel 263A for vacant Channel 274A at Glade Spring, Virginia,¹ and (b) the substitution of Channel 273A for Channel 263A at Marion, Virginia, and the modification of Station WOLD-FM's license accordingly.² Petitioner states its intention to apply for the channel, if reallocated to Weber City.

2. Petitioner invokes the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.³ In considering a reallocation

¹ Channel 274A at Glade Spring (FM137) is listed among other vacant nonreserved band FM allotments in Broadcast Auction No. 62, previously scheduled to commence on November 1, 2005. Auction No. 62 has been rescheduled for January 12, 2006. See *Public Notice*, DA 05-2478, released September 21, 2005.

² Petitioner states that although Channel 263A was substituted for Channel 273A at Marion, Virginia, pursuant to a *Report and Order* in MM Docket No. 99-244, Station WOLD-FM is currently operating on Channel 273A. See 16 FCC Rcd 18084 (2001). Because Station WOLD-FM has not effectuated the channel change, the reimbursement requirements of *Circleville* are not applicable. See *Circleville, Ohio*, 9 RR 2d 1579 (1967).

³ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities.⁴ In support of its proposal, Petitioner states that Weber City is an incorporated town located in Scott County, Virginia. It is listed in the 2000 U.S. Census with population of 1,333 persons. Weber City has a town government, an elementary school, fire department and a U.S. Post Office and zip code (24290). It has a cable television system, a number of commercial establishments, including two automobile dealerships, a floor covering dealership, five market/convenience stores, two banks, a florist, two fuel/oil distributors, a funeral home, a furniture store, an insurance agency, a manufactured home dealer, a nursing home, a medical clinic, a pharmacy, a truck leasing agency and a warehouse.

3. Petitioner notes that the Commission's FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, *supra*, would be served because the reallocation of Channel 274C3 to Weber City could provide the community with its first local aural transmission service. Because Station WVEK-FM's proposed 70 dBu contour covers 100 percent of the Kingsport, Tennessee-Virginia Urbanized Area, Petitioner is requested to provide the required *Tuck* analysis demonstrating that Weber City is deserving of a first local service preference.⁵ Petitioner is also requested to provide the overall public interest benefits that would be derived by the reallocation of Channel 274C3 to Weber City, Virginia.

4. We believe the proposal warrants consideration because the reallocation of Channel 274C3 to Weber City, Virginia, could provide the community with its first local aural transmission service, without depriving Cumberland (population 2,611) of its sole local service.⁶ An engineering analysis has determined that Channel 274C3 can be reallocated to Weber City in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.9 kilometers (6.8 miles) south at Petitioner's requested site.⁷ To accommodate the reallocation, Channel 263A can be substituted at Glade Spring with a site restriction of 14.0 kilometers (8.7 miles) east at Petitioner's requested site;⁸ and Channel 273A can be substituted at Marion with a site restriction of 2.5 kilometers (1.6 miles) north

⁴ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters. Equal weight is given to priorities (2) and (3).

⁵ Petitioner claims that in a prior proceeding (MM Docket No. 99-244), the Commission determined that Weber City had satisfied five of the eight *Tuck* factors for a first local service preference. Because of the passage of time and denial on other grounds in that proceeding, Petitioner must submit an updated *Tuck* showing in the instant proceeding. See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951) *RKO General, Inc. (KFRC) ("KFRC")*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck ("Tuck")*, 3 FCC Rcd 5374 (1988).

⁶ Station WCPM(AM) 1280 KHz would remain licensed to Cumberland.

⁷ The reference coordinates for Channel 274C3 at Weber City are 36-31-36 North Latitude and 82-35-13 West Longitude.

⁸ The reference coordinates for Channel 263A at Glade Spring are 36-47-50 North Latitude and 81-36-52 West Longitude.

at Petitioner's requested site.⁹ In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall propose to modify the authorization of Station WVEK-FM without entertaining competing expressions of interest in the use of Channel 274C3 at Weber City, Virginia, or requiring Petitioner to demonstrate the availability of an additional equivalent channel for use by other parties.

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel Nos.</u>	
	<u>Present</u>	<u>Proposed</u>
Cumberland, Kentucky	274A	---
Glade Spring, Virginia	274A	263A
Marion, Virginia	230C, 263A, 278A	230C, 273A, 278A
Weber City, Virginia	---	274C3

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Emerald Sound, Inc., licensee of Station WOLD-FM, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 273A in lieu of Channel 263A at Marion, Virginia.

7. Pursuant to Section 1.87 of the Commission's Rules, Emerald Sound, Inc., may, no later than January 9, 2006, file a written statement showing with particularity why its respective license should not be modified as proposed in this *Order to Show Cause*. The Commission may call on Emerald Sound, Inc., to furnish additional information. If raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modifications, deny the modifications, or set the matter of modifications for hearing. If no written statement is filed by the date referred to above, Emerald Sound, Inc., will be deemed to have consented to the modification as proposed in this *Order to Show Cause* and a final *Order* will be issued by the Commission, if the channel modification is found to be in the public interest.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

⁹ The reference coordinates for Channel 273A at Marion are 36-54-10 North Latitude and 81-32-27 West Longitude.

9. Pursuant to 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 9, 2006, and reply comments on or before January 24, 2006, and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Petitioner's counsel, as follows:

Dennis J. Kelly, Esq.
Post Office Box 41177
Washington, D.C. 20018

10. IT IS ORDERED, That the Secretary of the Commission shall send by Certified Mail Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Emerald Sound, Inc.
P.O. Box 1047
Marion, Virginia 24354
(Licensee of Station WOLD-FM)

11. Parties must file an original and four paper copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. **All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.¹⁰ This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

¹⁰ See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Sharon P. McDonald, Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, **IT IS PROPOSED TO AMEND** the M Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making and Order to Show Cause* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making and Order to Show Cause* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See 47 C.F.R. Section 1.420(d)).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making and Order to Show Cause* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service (see 47 C.F.R. Section 1.420(a), (b) and (c)). Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Information Reference Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C. 20554.